

No. 82-1608

Office - Supreme Court, U.S.

FILED

NOV 25 1983

ANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

Of Counsel

DONALD I. BAKER

KAREN L. GRIMM

SUTHERLAND, ASBILL &
BRENNAN

1666 K Street, N.W.

Washington, D.C. 20006

(202) 872-7800

ERWIN N. GRISWOLD

RICHARD S. MYERS

JONES, DAY, REAVIS &
POGUE

1735 Eye Street, N.W.

Washington, D.C. 20006

(202) 861-3898

LEROY E. DEVEAUX

(Counsel Of Record)

RICHARD L. CRABTREE

MICHAEL G. KARNAVAS

WANAMAKER, DEVEAUX &
CRABTREE, APC

1031 West Fourth Avenue

Suite 401

Anchorage, Alaska 99501

(907) 279-6591

Counsel for Petitioner

QUESTIONS PRESENTED

1. Can a state, without the express consent of Congress, prohibit private parties from exporting into interstate and foreign commerce unprocessed logs obtained from state-owned lands, when both the stated purpose and the effect of the prohibition are to favor local manufacturing interests?

2. Can Congressional consent to an otherwise unconstitutional state restraint on interstate and foreign commerce be implied from federal statutes or administrative rules solely regulating activities on federally-owned lands?

PARTIES INVOLVED

South-Central Timber Development, Inc., has one subsidiary, South-Central Export Sales Co., and no affiliates. When this suit was originally filed, South-Central was a wholly-owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation. On or about February 17, 1983, Far North Supply Corporation, a Washington corporation, purchased all the shares of South-Central, and now operates South-Central as a wholly-owned subsidiary. Far North Supply Corporation has no other affiliates or subsidiaries.

Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, Geoffrey Haynes, Director of the Division of Lands of the Department of Natural Resources, and Theodore G. Smith, Director of Forest, Land and Water Management, of the Department of Natural Resources, were appellants below and defendants in the district court. These individuals no longer hold the positions responsible for implementing the state policy being challenged. Moreover, Alaska has reorganized the relevant departments. As a result, respondents now are: Esther Wunnicke, Commissioner of the Department of Natural Resources; Thomas J. Hawkins, Director of the Division of Land and Water Management; and John L. Sturgeon, State Forester. Respondent, Kenai Lumber Company, Inc., a subsidiary of Louisiana Pacific Corporation, which operates a processing mill in the vicinity and was a competing bidder on the Icy Cape No. 2 sale, was an appellant below and an intervenor-defendant in the district court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT	2
A. Facts	2
B. Proceedings Below	6
1. District Court Decision	6
2. Court of Appeals Decision	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. Alaska's Primary Manufacture Requirement Violates The Commerce Clause	11
A. A State-Imposed Primary Manufacture Requirement Applied To Natural Resources Is A <i>Per Se</i> Violation Of The Commerce Clause	11
B. The State Restriction Here Directly Burdens Foreign Commerce And Thus Impermissibly Interferes With A Preeminently Federal Function	14
II. Congressional Consent To Alaska's Primary Manufacture Requirement Has Not Been Given Expressly; Alaska's Action Is, Therefore, Subject To Traditional Commerce Clause Restraints	22
A. Congressional Consent To State Action That Would Otherwise Violate The Commerce Clause Must Be Stated Expressly	22
B. Congress Has Not Authorized Alaska's Restriction On Interstate And Foreign Commerce	27
III. The Market Participant Doctrine Does Not Immunize Alaska From The Requirements Of The Commerce Clause	32
CONCLUSION	44

TABLE OF AUTHORITIES

CASES:	Page
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	12, 43
<i>Board of Trustees v. United States</i> , 289 U.S. 48 (1933)	14-15
<i>Bob-Lo Excursion Co. v. Michigan</i> , 333 U.S. 28 (1948)	18
<i>Bowman v. Chicago & Northwestern Railway Co.</i> , 125 U.S. 465 (1888)	15, 19
<i>Buttfield v. Stranahan</i> , 192 U.S. 470 (1904)	14
<i>Cook v. United States</i> , 288 U.S. 102 (1933)	20
<i>Foster-Fountain Packing Co. v. Haydel</i> , 278 U.S. 1 (1928)	12-13
<i>H.P. Hood & Sons v. DuMond</i> , 336 U.S. 525 (1949)	12, 23-24, 32
<i>Henderson v. Mayor of New York</i> , 92 U.S. 259 (1875)	15
<i>Hicklin v. Orbeck</i> , 437 U.S. 518 (1978)	37-40
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	15, 17, 20
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	6, 33-34, 36, 37, 40, 41, 42
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	13, 25, 37
<i>Japan Line, Ltd. v. County of Los Angeles</i> , 441 U.S. 434 (1979)	15-16, 17-18, 21, 41
<i>Leisy v. Hardin</i> , 135 U.S. 100 (1890)	23
<i>Lewis v. BT Investment Managers, Inc.</i> , 447 U.S. 27 (1980)	22
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	27
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> , 309 U.S. 33 (1940)	14
<i>Missouri v. Holland</i> , 252 U.S. 416 (1920)	20
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	43
<i>New England Power Co. v. New Hampshire</i> , 455 U.S. 331 (1982)	24-25, 37
<i>Parker v. Brown</i> , 317 U.S. 341 (1943)	24

Table of Authorities Continued

	Page
<i>Pennsylvania v. West Virginia</i> , 262 U.S. 553 (1923)	11-12
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	7, 12
<i>Prudential Insurance Co. v. Benjamin</i> , 328 U.S. 408 (1946)	23
<i>In re Rahrer</i> , 140 U.S. 545 (1891)	23
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	6, 34-35, 36, 37, 40, 41, 42, 43
<i>Smith v. Department of Agriculture</i> , 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981)	40
<i>South Carolina State Highway Department v. Barnwell Brothers</i> , 303 U.S. 177 (1938)	13-14
<i>Southern Pacific Co. v. Arizona</i> , 325 U.S. 761 (1945)	22, 24-25
<i>Sporhase v. Nebraska ex rel. Douglas</i> , 102 S. Ct. 3456 (1982)	13, 22, 25-26, 37
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948)	12-13
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304 (1936)	15
<i>United States v. South-Eastern Underwriters Ass'n</i> , 322 U.S. 533 (1944)	23
<i>West v. Kansas Natural Gas Co.</i> , 221 U.S. 229 (1911)	11
<i>Western & Southern Life Insurance Co. v. State Board of Equalization</i> , 451 U.S. 648 (1981)	23
<i>White v. Massachusetts Council of Construction Em- ployers, Inc.</i> , 103 S. Ct. 1042 (1983)	26, 35-36, 37-38, 40
<i>Zachernig v. Miller</i> , 389 U.S. 429 (1968)	15, 17
 CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND LEGISLATIVE MATERIALS:	
U.S. Const. art. I, § 8, cl. 3	<i>passim</i>
U.S. Const. art. IV, § 2, cl. 1	38
Act of April 12, 1926, 16 U.S.C. § 616 (1982)	28
Act of May 11, 1926, 44 Stat. 512	28

Table of Authorities Continued

	Page
Department of Interior Appropriations Act, Pub. L. No. 93-120, § 301, 87 Stat. 511 (1973)	29
Department of Interior Appropriations Act, Pub. L. No. 96-126, §§ 301, 308, 93 Stat. 979-80 (1979)	29, 31
Export Administration Act of 1979, 50 U.S.C. app. § 2401 <i>et seq.</i> (Supp. III 1979)	18-19, 31
Foreign Assistance Act of 1968, Pub. L. No. 90-554, § 401, 82 Stat. 966	29
Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 921, 84 Stat. 1817	29
Jones Act, 46 U.S.C. § 883 (Supp. V 1981)	14
McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 (1982)	23
Native Claims Settlement Act, 43 U.S.C. § 1621(k)(1) (1976)	30
Organic Administration Act of 1897, 16 U.S.C. §§ 475, 476, 551 (§ 476 <i>repealed by</i> National Forest Management Act of 1976, § 13, 90 Stat. 2958)	28
Trade Agreements Act of 1979, 19 U.S.C. § 2532 <i>et seq.</i> (Supp. V 1981)	18
Trans-Alaska Pipeline Authorization Act, 30 U.S.C. § 185(u) (1976)	19
Wilson Act, 27 U.S.C. § 121 (1976)	23
General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55-61 U.N.T.S. 20-21	
Alaska Stat. § 38.05.115 (1977)	2, 3
Alaska Admin. Code tit. 11, § 71.230 (1982)	2, 3
Alaska Admin. Code tit. 11, § 71.910(11) (1982)	2, 3
Alaska Admin. Code tit. 11, § 76.130 (1974) (<i>repealed</i> 1982)	2, 3
Cal. Pub. Res. Code § 4650.1 (West Supp. 1982)	21
Idaho Code § 58-403 (1976)	21
Or. Rev. Stat. § 526.805 (1981)	21
15 C.F.R. § 377.7 (1983)	19, 31

Table of Authorities Continued

	Page
36 C.F.R. § 223.10(c) (1982)	28, 31-32
36 C.F.R. § 223.10(i) (1977)	29
H.R. 8547, 93d Cong., 1st Sess. (1973)	30
H.R. 5544, 94th Cong., 1st Sess. (1975)	30
H.R. 6820, 94th Cong., 1st Sess. (1975)	30
H.R. 7972, 95th Cong., 1st Sess. (1977)	30
H.R. 7255, 96th Cong., 2d Sess. (1980)	30
H.R. 639, 97th Cong., 1st Sess. (1981)	30
S. 1734, 92d Cong., 1st Sess. (1971)	30
S. 1033, 93d Cong., 1st Sess. (1973)	30
S. 1507, 93d Cong., 1st Sess. (1973)	30
S. 1775, 93d Cong., 1st Sess. (1973)	30
S. 1820, 93d Cong., 1st Sess. (1973)	30
H.R. Rep. No. 93-325, 93d Cong., 1st Sess. (1973) ...	30
S. Rep. No. 93-198, 93d Cong., 1st Sess. (1973)	30
<i>Export Control Policy: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture And Forestry, 93d Cong., 1st Sess. (1973)</i>	16, 30
<i>Extension and Revision of the Export Administration Act of 1969: Hearings and Mark-Up Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. (1979)</i>	31
<i>Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business, 90th Cong., 2d Sess. (1968)</i>	14, 16, 20, 29
<i>Log Export Restrictions: Hearings on S. 1033 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (1973)</i>	16

Table of Authorities Continued

	Page
<i>Prohibit Export of Unprocessed Lumber: Hearing on H.R. 639 Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture, 97th Cong., 1st Sess. (1981)</i>	17, 30
<i>Public Timber Export Control: Hearings on H.R. 5544 and H.R. 6820 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975)</i>	16-17, 30
<i>Resources Planning Act Assessment and Domestic Timber Supply Act: Hearings on H.R. 7255 Before the Subcomm. on Forests of the House Comm. on Agriculture, 96th Cong., 2d Sess. (1980)</i>	17
<i>Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (1973)</i>	14, 16, 30
<i>United States Trade with Japan, Public Lands Timber Export Bill (H.R. 7972): Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 2d Sess. (1978)</i>	17, 30
OTHER AUTHORITIES:	
<i>Anson & Schenkkan, Federalism, The Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71 (1980)</i>	36, 39, 43
<i>Balkanizing Canada: The Cost of Provincial Barriers, Bus. Wk., Sept. 15, 1980</i>	11
<i>Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L.J. 219 (1957)</i>	13
<i>Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 387 (1983)</i>	27
<i>The Federalist No. 22 (A. Hamilton)</i>	12
<i>Hanke, Trade Agenda for the Japan Trip, Wall St. J., Nov. 4, 1983</i>	17, 19

Table of Authorities Continued

	Page
Hellerstein, <i>Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources</i> , 1979 Sup. Ct. Rev. 51 (1980)	7, 39
Jackson, <i>World Trade and the Law of GATT</i> (1969)	20-21
Levmore, <i>Interstate Exploitation and Judicial Intervention</i> , 69 Va. L. Rev. 563 (1983)	12-13
G. Lindell, <i>Log Export Restrictions of the Western States and British Columbia</i> (U.S. Dept. of Agriculture 1978)	21
Note, <i>The Commerce Clause and Federalism: Implications for State Control of Natural Resources</i> , 56 Geo. Wash. L. Rev. 601 (1982)	37
Note, <i>Federal Limitations on State "Buy American" Laws</i> , 21 Colum. J. Transnat'l L. 177 (1982)	15
J. Nowak, R. Rotunda, and J. Young, <i>Constitutional Law</i> (2d ed. 1983)	27
O'Fallon, <i>The Commerce Clause: A Theoretical Comment</i> , 61 Or. L. Rev. 395 (1982)	26
Oregon Joint Legislative Committee on Trade and Economic Development, <i>Final Draft, The Log Export Issue: An Analysis</i> (1983)	31
<i>The Second War between the States</i> , Bus. Wk., May 17, 1976	11
R. Stern & E. Gressman, <i>Supreme Court Practice</i> (5th ed. 1978)	4
L. Tribe, <i>American Constitutional Law</i> (1978)	16
Tushnet, <i>Rethinking The Dormant Commerce Clause</i> , 1979 Wis. L. Rev. 125	14
Varat, <i>State "Citizenship" and Interstate Equality</i> , 48 U. Chi. L. Rev. 487 (1981)	37, 39, 43
Wechsler, <i>The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government</i> , 54 Colum. L. Rev. 543 (1964)	27
Wells & Hellerstein, <i>The Governmental-Proprietary Distinction in Constitutional Law</i> , 66 Va. L. Rev. 1073 (1980)	48

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 890, and is set forth in the Joint Appendix ("J.A.") at 138a-44a. The memorandum and order of the United States District Court for the District of Alaska is reported at 511 F. Supp. 139, and appears at J.A. 127a-35a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 1, 1982. (J.A. at 145a). On February 17, 1983, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and

including March 30, 1983. The Petition for Certiorari was filed on March 30, 1983, and was granted on October 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provision, statutes, and regulations: the Commerce Clause of U.S. Const. art. I, § 8, cl. 3; Alaska Stat. § 38.05.115 (1977); Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, § 71.230 (1982); and Alaska Admin. Code tit. 11, § 71.910(11) (1982). These provisions are set forth in the Appendix to the Petition for Certiorari ("Pet. App.") at 19a-21a.

STATEMENT

A. Facts

This case involves an attempt by Alaska to require that timber cut from state-owned lands be processed in-state prior to being exported into foreign or interstate commerce. In September, 1980, Alaska's Commissioner of the Department of Natural Resources published a notice of sale for approximately 49,000,000 board feet of timber in the area of Icy Cape, Alaska. (J.A. at 34a). The notice of sale, the prospectus, and the proposed contract for the Icy Cape No. 2 sale all imposed a primary manufacture requirement, i.e., the timber would have to be processed in-state prior to being exported into either interstate or foreign commerce.¹ In other words, Alaska sought to impose a complete ban on the export of unprocessed logs from the area covered by the sale.

¹The notice of the Icy Cape No. 2 timber sale provided that "[p]rimary manufacture within the State of Alaska will be required as a special provision of the contract." (J.A. at 35a). The prospectus provided that "primary manufacture shall be as defined under Alaska Admin. Code Title 11, § 76.130 of the Timber Sales Regulations' and as further defined in the Governor's Policy Statement on Primary Manufacture' dated May 7, 1974." (R. at Tab 4). The timber sale

The Commissioner's action was taken pursuant to state regulations in effect at the time, *see* Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982) (J.A. at 20a-21a),² and in response to resolutions of the state legislature requesting him to exercise his statutory authority³ to impose the primary

contract, which the successful bidder on the Icy Cape No. 2 timber sale would have been required to sign, provided as follows:

Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974.

For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

The primary manufacture regulation, Alaska Admin. Code tit. 11, § 76.130 referenced above is set out in Pet. App. at 20a; the Governor's Policy Statement on Primary Manufacture referenced above is set out in J.A. at 33a.

² Although the original primary manufacture regulation has been repealed, it has been replaced by two other provisions which continue and to some extent even strengthen Alaska's policy. *See* Alaska Admin. Code tit. 11, § 71.230 (1982) and Alaska Admin. Code tit. 11, § 71.910(11) (1982) (Pet. App. at 19a-20a). Moreover, as respondents have noted, while the Commissioner had discretion under the regulation to decide whether or not to require primary manufacture for any given sale, the state "usually" requires purchasers of state-owned timber to have primary manufacture performed within the state. (Def. Br. (Ct. App.) at 6.)

³ The Commissioner's statutory authority is defined in Alaska Stat. § 38.05.115, which states that the Commissioner "upon recommendation of the director, shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale." (Pet. App. at 19a).

manufacture requirement in order "to provide local employment as well as building materials for the Alaska market." (J.A. at 53a).⁴ There is no dispute about the underlying purpose of the primary manufacture requirement: as the state itself concedes, the primary manufacture requirement reflects a longstanding policy of the State of Alaska to protect and promote its own timber processing industry. (R. at Tab 45, at 3).⁵

Petitioner, South-Central Timber Development, Inc., ("South-Central"), an Alaska corporation, is primarily engaged in the business of purchasing Alaska standing timber,⁶ logging such timber, and shipping the resulting logs into for-

⁴ We have been advised that Alaska on November 17, 1983, sold the Icy Cape No. 2 timber *without* a primary manufacture requirement. This, however, does not render this case moot for it is well-established that "mere voluntary cessation of allegedly illegal conduct, or a statement by the defendant that it would be uneconomical to engage in any further questioned behavior, does not render moot a suit for an injunction if it is possible for the defendant to resume such conduct." R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978), at 891, and cases cited therein. Here the district court entered a permanent injunction against enforcement of Alaska's primary manufacture requirement; Alaska has not abandoned that policy and is free to resume requiring primary manufacture at any time.

⁵ See also Final Finding for Icy Bay/Cape Yakataga sale (J.A. at 40a) ("[p]rimary manufacture will be required when necessary to assure a continuing supply of timber for existing industry.") As the Ninth Circuit noted, "The Commissioner stated the requirement was necessary [on the Icy Cape No. 2 sale] to insure 'a continuing supply of timber for existing industry' during temporary shortages of timber from federal lands." (693 F.2d at 892; J.A. at 140a-41a).

⁶ "Timber" means trees in their natural condition and location, live or dead from natural causes; "logs" means portions of trees cut into lengths, with limbs removed, transported off the land where they grew and ready for manufacture into lumber, plywood, paper or other usable products; "cants" are portions of logs which have been cut lengthwise and thus are flat on at least one side, but which will

eign commerce, almost exclusively to Japan. (J.A. at 5a). At the time of the proposed sale, South-Central was logging timber in the same general area under an earlier state timber sale (known as "Icy Cape No. 1"), which did not require local processing, and exporting most of the logs to Japan. (J.A. at 8a). Because South-Central no longer had a working mill in the vicinity when the Icy Cape No. 2 sale was publicized, it would have been unable to meet the local processing requirement itself (J.A. at 8a), and it would have been uneconomical to contract the processing out to an in-state processor. Thus, because of the additional costs of having the primary manufacture performed in-state, petitioner was effectively precluded from bidding on the timber. (511 F. Supp. at 141; J.A. at 129a).

The public auction for the Icy Cape No. 2 sale was scheduled to be held on October 23, 1980. (J.A. at 34a). On October 16, 1980, South-Central, after having previously objected to the state on constitutional grounds about the primary manufacture requirement (J.A. at 27a), filed a Complaint for Injunctive Relief in the United States District Court for the District of Alaska. In the complaint, South-Central alleged that Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, and others,⁷ were preparing to hold the sale; that the primary manufacture requirement contained in the public notice and state contract for that sale was repugnant to the Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3); and that it would suffer irreparable harm if the sale were not enjoined.

have to be cut lengthwise again to produce lumber suitable for end use. Under the Alaska regulation in effect at the time of the proposed sale, primary manufacture could be accomplished by processing logs into cants or chips.

⁷ Robert LeResche and the other individual defendants in the proceedings below no longer hold the offices in question. See p. ii for a current listing of the individual respondents.

B. Proceedings Below

1. District Court Decision

On January 5, 1981, the United States District Court for the District of Alaska issued a Memorandum and Order granting the Petitioner's Motion for Summary Judgment and a Permanent Injunction. The Court enjoined the Icy Cape No. 2 sale on the ground that the primary manufacture regulation violated the Commerce Clause of the Constitution (U.S. Const. art. I, § 8, cl. 3). (511 F. Supp. at 140, 144; J.A. at 128a-29a, 135a). The Judgment, which granted a Permanent Injunction prohibiting the defendants from requiring primary manufacture under the state regulations, was entered by the district court on January 6, 1981. (J.A. at 136a).

The district court rejected respondents' argument that the primary manufacture requirement did not violate the Commerce Clause because the state's policy was consistent with federal policy as to federal lands. After examining federal statutes and regulations restricting the export of unprocessed logs from *federal* lands, the court concluded:

Congress has not consented to any primary manufacture requirements imposed *by the states*. . . .

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from *federal* lands, *it has in no way expressly exempted state timber laws from commerce clause restrictions*.

(511 F. Supp. at 141-42; J.A. at 131a)(emphasis added).

The district court also rejected Alaska's argument that the challenged action was exempt from Commerce Clause scrutiny because it was acting in a proprietary capacity. The court, rejecting Alaska's reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), noted that here, unlike the situation in *Alexandria Scrap*, "the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity,"

and that, unlike man-made commodities, "[t]imber is not . . . capable of being readily produced by any State at any time." (511 F. Supp. at 142; J.A. at 132a-33a). Consequently, concluded the court, "[t]he uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land." (511 F. Supp. at 142-43; J.A. at 133a). Moreover, said the court, "[w]hile the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .'" (511 F. Supp. at 143; J.A. at 133a) (quoting *Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980)).

On the merits of the Commerce Clause issue, the court, applying the *Pike* test (*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)), held that the primary manufacture requirement was unconstitutional. The court found that the in-state processing requirement did not regulate even-handedly,⁸ that it constituted simple economic protectionism, and that it placed a substantial burden on commerce. (511 F. Supp. at 143; J.A. at 134a). The court also concluded that Alaska had less burdensome means available to it to achieve the same end. (511 F. Supp. at 143-44; J.A. at 134a-35a).

⁸The court reasoned that the requirement did not regulate even-handedly since it did not fall evenly on companies with in-state timber processing mills and companies with out-of-state timber processing mills, and that the requirement precluded South-Central from competing on an equal footing with companies that possess in-state mills capable of performing primary manufacture. (511 F. Supp. at 143; J.A. at 134a-35a).

2. Court of Appeals Decision

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. (693 F.2d at 890-93; J.A. at 138a-44a). The court noted that the Commerce Clause, by its own power, invalidates state statutes that discriminate against or unduly burden interstate commerce; that in the absence of Congressional authorization, "state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case," and that the "rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources"—which is precisely the case here. (693 F.2d at 892; J.A. at 141a).

The court of appeals also recognized that this Court has carved out a narrow exception to this general rule for situations in which a state acts as a "market participant" rather than a "market regulator." It concluded, however, that it did not have to resolve the market participant issue since "[t]his [was] not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy." (693 F.2d at 892; J.A. at 142a).

On the Congressional authorization issue, the Ninth Circuit recognized "[t]he rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce"—saying it "usually is applied in cases where Congress has expressly authorized such regulation." (693 F.2d at 893; J.A. at 142a). The court then stated, *without citing any authority*, that "such express authorization is not always necessary." (693 F.2d at 893; J.A. at 142a). The court's support for its novel "implicit approval" theory was stated in a single sentence: "[t]here will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy *without explicit congressional approval*, even if the purpose and effect of the state law is to favor local interests." (693 F.2d at 893; J.A. at 142a)(emphasis added).

The Ninth Circuit then found that "there is *implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands." (693 F.2d at 891; J.A. at 139a) (emphasis added). In particular, the court found that the federal policy with respect to timber cut from federal lands "evinced a general federal policy of promoting geographic dispersion in the timber industry" (693 F.2d at 893; J.A. at 143a), and that Alaska's policy served the same objective as the federal policy, i.e., "that of promoting industrial developments in isolated areas." (693 F.2d at 893; J.A. at 143a). Because, according to the court, "[t]he state's decision could not have been more in keeping with federal timber policy," there was "ample congressional acquiescence in Alaska's primary manufacture requirement." (693 F.2d at 893; J.A. at 144a).

SUMMARY OF ARGUMENT

1. Alaska's primary manufacture requirement constitutes a clear violation of the Commerce Clause. Even where only interstate commerce is involved, this Court has long held that protectionist state-imposed restrictions reserving natural resources for in-state processors constitute a *per se* violation of the Commerce Clause. This case, moreover, involves a burden on *foreign commerce* where constitutional scrutiny is even more rigorous, and state-imposed restrictions on that commerce are even more suspect. What Alaska has done here by banning the export of unprocessed logs conflicts with both our Nation's export policies and its international trading obligations. It precludes our Nation from being able to speak with "one voice" vis-a-vis one of its major trading partners (Japan), and trespasses on an area over which Congress has "exclusive and absolute" power. This Alaska cannot do consistently with the Commerce Clause.

2. Alaska's protectionist scheme has not been duly authorized by Congress. The unprecedented "implicit approval" theory on which the Ninth Circuit based its decision is in direct conflict with the prior decisions of this Court that have held

that *express* Congressional authorization is required in order to validate an otherwise impermissible state restraint on interstate commerce. Such an "implicit approval" approach allows a court to indulge in "mere speculation as to what Congress probably had in mind," and is especially dangerous where, as here, the relevant legislative history supports an inference as to Congressional intent that is diametrically opposed to what the court below inferred.

3. The market participant doctrine cannot shield Alaska from the requirements of the Commerce Clause. Alaska here is not acting as a market participant but rather as a regulator of downstream conditions in a market—timber processing—in which it is not even engaged. Moreover, here, unlike prior situations in which this Court has applied the market participant doctrine, (i) the article of commerce at issue is not a manufactured good produced at a facility owned by the state, but rather a natural resource which is "by happenstance" located in the state; (ii) the primary economic impact of the state scheme is on out-of-state consumers rather than in-state taxpayers; (iii) the state regulation impacts most directly on foreign commerce rather than interstate commerce; and (iv) the state restraint involves a total ban on the export of a product beyond the state's borders, rather than a subsidy program funded by the state. If the market participant doctrine is applied to these extreme facts, the allocation of power between the federal government and the states under the Commerce Clause will be altered dramatically, and the concern expressed by members of this Court and others as well about the absence of any "limiting principles" to that doctrine will be realized.

28

ARGUMENT

I. Alaska's Primary Manufacture Requirement Violates The Commerce Clause.

A. A State-Imposed Primary Manufacture Requirement Applied To Natural Resources Is A *Per Se* Violation Of The Commerce Clause.

Alaska's primary manufacture requirement is precisely the type of conduct that this Court has held subject to a rule of virtual *per se* illegality. Here, Alaska has required business operations to be performed in-state that could more efficiently be performed elsewhere. Economic protectionism of this type has consistently been invalidated by this Court. Alaska's attempt to protect its wood processing industry should meet the same fate.

This Court has long recognized that the battle over the control and exploitation of this Nation's natural resources presents fundamental Commerce Clause concerns. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). It has emphasized that the power of local political units to reserve natural resources found within their borders for the benefit of their own inhabitants carries a serious potential for the division of the Nation along local or regional lines.⁹

If the States have [the power to confine natural resources found within their borders to their inhabitants] a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may

⁹ Others have made the same point. *See generally The Second War between the States*, Bus. Wk., May 17, 1976, at 92-114; *Balkanizing Canada: The Cost of Provincial Barriers*, Bus. Wk., Sept. 15, 1980, at 52.

be retaliated by embargo, and commerce will be halted at state lines.

Pennsylvania v. West Virginia, 262 U.S. at 599.

The erection of trade barriers at state lines threatens the policy of the Commerce Clause to prevent states from isolating themselves from the national economic unit.¹⁰ As Justice Cardozo said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935): "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."¹¹

Accordingly, in Commerce Clause cases, this

Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1; *Johnson v. Haydel*, 278 U.S. 16; *Toomer v. Witsell*, 334 U.S. 385.

Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).¹² Because such restraints "impose an artificial rigidity on the economic

¹⁰ As Justice Jackson stated:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949).

¹¹ See also *The Federalist* No. 22 (A. Hamilton).

¹² In discussing *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), one commentator has noted: "a requirement that all shrimp caught in state waters be shelled in-state presents the obvious dan-

pattern of the industry," *Toomer v. Witsell*, 334 U.S. 385, 404 (1948), they threaten the animating purpose of the Commerce Clause—the union of a collection of independent, sovereign states into one nation.

Alaska's economic protectionism is precisely the type of action that this Court's Commerce Clause decisions have attempted to forestall.¹³ Alaska's primary manufacture requirement violates a fundamental Commerce Clause value—a "concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

Moreover, Alaska's restraint runs afoul of the basic Commerce Clause concern that those harmed by a governmental act be represented in the political body making the decision. This Court has exercised the "strictest scrutiny" when faced with facially discriminatory legislation, *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456, 3465 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), in part, because out-of-state parties are not represented in the political body enacting the discriminatory legislation. See, e.g., *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184

ger of cartelization by the state's shelling industry." Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 615 (1983) (footnote omitted). That danger is likewise present here with respect to Alaska's timber processing industry.

¹³ As one noted commentator has stated: "[W]hen the limits that the federal system imposes upon its components are in question, when the centrifugal, isolating or hostile forces of localism are manifested in state legislation, the interests of union require that these factors be recognized and the judicial negative be imposed." Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 220 (1957).

n.2 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); see also Tushnet, *Rethinking The Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 128 n.14. Here, the principal burden of the primary manufacture requirement falls on those located outside the state, and its only purpose is to protect in-state manufacturing interests. Alaska's requirement cannot, therefore, survive this Court's rule of virtual *per se* illegality.

B. The State Restriction Here Directly Burdens Foreign Commerce And Thus Impermissibly Interferes With A Preeminently Federal Function.

The primary impact of Alaska's restraint falls on foreign rather than interstate commerce since most of the timber harvested in Alaska is exported—principally to Japan.¹⁴ South-Central has been effectively prevented from exporting unprocessed logs produced from timber previously owned by the state. Thus, without the express consent of Congress, a state restraint designed solely to protect local manufacturing interests has directly interfered with foreign commerce.

This Court has long construed the Commerce Clause to have granted Congress "exclusive and absolute" power over foreign commerce. *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904). And, "[i]t is an essential attribute of the power that it is

¹⁴ Exports account for well over 90% of the sales of wood products produced from Alaska timber, and virtually all such exports are destined for Japan. See *Shortages and Rising Prices of Softwood Lumber. Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 329 (1973). This is due primarily to the high shipping costs imposed by the Jones Act, 46 U.S.C. § 883 (Supp. V 1981) on traffic between American ports, which makes the transportation of logs to the lower 48 states uneconomical. *Id.* at 306; see *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. Pt. 2, 591 (1968).

exclusive and plenary . . . [and that] its exercise may not be limited, qualified or impeded to any extent by state action." *Board of Trustees v. United States*, 289 U.S. 48, 56 (1933). As this Court explained almost one hundred years ago,

Laws which concern the exterior relations of the United States with other Nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties.

Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465, 482 (1888). See *Zschemig v. Miller*, 389 U.S. 429, 436 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875). See also Note, *Federal Limitations on State "Buy American" Laws*, 21 Colum. J. Transnat'l L. 177, 209 (1982).

Commerce Clause scrutiny is, therefore, more rigorous when a state restraint on foreign commerce is established than when only interstate commerce is involved. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), this Court rejected appellees' argument that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved," 441 U.S. at 446, and held that "[w]hen construing Congress' power to 'regulate Commerce with foreign nations,' a more extensive constitutional inquiry is required." *Id.* This is because

[f]oreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. . . ." Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce

power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction. . . . Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

441 U.S. 434, 448-49 (footnotes omitted; citations omitted). Thus, at the very least, "[i]f state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 370 (1978).

Here, there can be no doubt that a log export ban involves commercial relations with foreign nations and that it affects national concerns to a "significant degree." This Nation's log export policy is a controversial issue that has been repeatedly considered by Congress during the past fifteen years, and the international implications of that policy have been examined at length.¹⁵ Involving, as it does, serious questions about our

¹⁵ See *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. Pts. 1, 2, 3, 4 (1968) [hereinafter 1968 Hearings]; *Export Control Policy: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. (1973); *Log Export Restrictions: Hearing on S. 1033 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. Pts. 1, 2 (1973); *Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. (1973); *Public Timber Export Control: Hearings on H.R. 5544 and H.R. 6820 Before the Subcomm. on Public Lands of the House Comm. on*

"longstanding policy of not imposing unnecessary barriers to international trade," our desire to further "the development of amicable relations with Japan," our desire to improve our balance of payments condition, our concern about possible Japanese retaliation, and our worries about increased reliance by Japan on the U.S.S.R. for its log supplies, any restriction on log exports is clearly a matter of intrinsic national and international importance.¹⁸

As this Court explicitly recognized in *Japan Line*, the United States must be able to speak with "one voice" in matters involving commercial relationships with foreign nations. Indeed, so essential is it to safeguard our Nation's continued ability to speak with "one voice" in foreign affairs that this Court has not hesitated to invalidate state statutes involving this nation's relationships with foreign countries even though they have not actually interfered with the conduct of this Nation's foreign policy, see *Zschemig v. Miller*, 389 U.S. 429 (1968), and even though they may be wholly consistent with and complement federal law, see *Hines v. Davidowitz*, 312 U.S. 52 (1941). Thus, although it may be permissible to uphold against Commerce Clause attack a state statute such as that in

Interior and Insular Affairs, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Hearings]; *United States Trade With Japan, Public Lands Timber Export Bill (H.R. 7972): Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 2d Sess. (1978) [hereinafter 1978 Hearings]; *Resources Planning Act Assessment and Domestic Timber Supply Act: Hearings on H.R. 7255 Before the Subcomm. on Forests of the House Comm. on Agriculture*, 96th Cong., 2d Sess. (1980); *Prohibit Export of Unprocessed Timber: Hearing on H.R. 639 Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture*, 97th Cong., 1st Sess. (1981) [hereinafter 1981 Hearings].

¹⁸ 1968 Hearings Pt. 3, at 1189; see, e.g., *id.* at 926, 1019, 1137-39, 1144, 1149-50, 1190, 1198-99, 1381-88; 1968 Hearings Pt. 1, at 269-70, 374-78. See also Hanke, *Trade Agenda for the Japan Trip*, Wall St. J., Nov. 4, 1983, at 34, col. 4.

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), which "posed no threat at all to the Federal Government's ability to 'speak with one voice' in regulating foreign trade," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 456 n.20, it is not permissible to do so where there is such a threat.

Such a threat is clearly present here. First, Alaska's action conflicts with the national export policy established by Congress. Congress has expressly prohibited states, federal agencies, and private persons from engaging in "standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States." 19 U.S.C. §§ 2532, 2533 (Supp. V 1981).¹⁷ It also has explicitly recognized that export restrictions have potentially serious implications for international relations; that "the ability of United States citizens to engage in international commerce is a fundamental concern of United States policy," and that "[u]ncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States." Export Administration Act of 1979, 50 U.S.C. app. § 2401(1), (2) and (6) (Supp. III 1979). As Congress has provided, "[i]t is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations" Export Administration Act of 1979, 50 U.S.C. app. § 2402(1) (Supp. III 1979).

In accord with these overriding principles, Congressionally-imposed export restrictions are generally limited to situations where export controls are deemed necessary to serve national security purposes (50 U.S.C. app. § 2404), to further foreign policy objectives (50 U.S.C. app. § 2405), or to retain for domestic use commodities determined to be in short supply. (50 U.S.C. app. § 2406). Consequently, Congress has been

¹⁷ "Standard" is defined to include "(A) The specification of the characteristics of a product, including [its] . . . dimensions." 19 U.S.C. § 2571(13).

very specific in stating when it wants export controls to be imposed. One example of this is found in the controls imposed on Alaska North Slope crude oil, which cannot be exported to foreign countries subject to some very limited exceptions. *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. § 185(u) (1976); Export Administration Act of 1979, 50 U.S.C. app. § 2406(d)(Supp. III 1979).

In contrast, Congress has authorized a general export ban on unprocessed logs from *federal* lands only (*see* discussion, *infra*, at 28-31). The only federal statute regulating exports of timber from *state* lands bans the export of only one specific type of lumber—unprocessed Western red cedar—and Alaska is expressly exempted from even that limited ban. Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i); *see* 15 C.F.R. § 377.7 (1983). Thus, if any inference at all is to be drawn as to the intent of Congress, it is not the inference the Ninth Circuit drew, but rather the opposite: if Congress had intended export controls to be applied to timber from *state*-owned lands as well as federal lands, it would have said so.¹⁸ It did not do so. It has, on the contrary, expressed its general policy objectives to “minimize uncertainties in export control policy;” “to encourage trade with all countries with which the United States has diplomatic or trading relations;” and to “minimiz[e] restrictions on exports of agricultural commodities and products.” *See* 50 U.S.C. app. §§ 2401(9), 2402(1)(Supp. III 1979). The export restriction imposed by Alaska contravenes all of these objectives and frustrates the federal government’s ability to speak with “one voice” vis-a-vis a particularly sensitive trading partner, Japan. *See generally* Hanke, *Trade Agenda for the Japan Trip*, Wall St. J., Nov. 4, 1983, at 34, col. 4.

¹⁸ *See Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465, 482 (1888) (“It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States”).

Second, Alaska's restraint on foreign trade conflicts with the free trade principles set forth in the General Agreement on Tariffs and Trade ("GATT"), to which both the United States and Japan are parties. *See, e.g., 1968 Hearings Pt. 3*, at 1383 (to curtail log exports would conflict with GATT free trade policy). For example, Article XI of GATT states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A32, T.I.A.S. No. 1700, 55-61 U.N.T.S. There can be little question here that Alaska has imposed "restrictions other than duties, taxes or other charges . . . on the exportation or sale for export of any product destined for the territory of any other contracting party" (*i.e.*, Japan). While Congress can, under accepted principles of international law, itself abrogate its treaty commitments by subsequently enacting inconsistent federal legislation, *see, e.g., Cook v. United States*, 288 U.S. 102, 120 (1933), it is quite another matter for a state such as Alaska to take it upon itself to cause the United States effectively to violate its international trading obligations. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920); *Hines v. Davidowitz*, 312 U.S. 52, 63-65 (1941).¹⁹

¹⁹ Indeed, Article XXIV, paragraph 6, of GATT provides that

[e]ach contracting party shall take such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

61 Stat. A67-68. Thus, GATT does apply to state laws, and this is as it should be for

[l]ocal laws can be just as disruptive of international trade as federal laws and local parochialism leading to protectionist efforts to prefer local products can be as damaging to the pur-

Finally, the situation here, as in *Japan Line*, is especially significant since it is not only the action of Alaska that is ultimately at issue.²⁰ In addition to Alaska, the States of California, Idaho and Oregon impose primary manufacture requirements which prohibit to differing degrees the export into foreign commerce of unprocessed logs from state-owned lands. See Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Idaho Code § 58-403 (1976); Or. Rev. Stat. § 526.805 (1981).²¹ All of these statutes contain different definitions of primary manufacture, provide different exceptions, and impose different procedural requirements for invoking such exceptions. See generally G. Lindell, *Log Export Restrictions of the Western States and British Columbia* (U.S. Dept. of Agriculture 1978) (J.A. at 93a-119a). Other western states impose no primary manufacture requirement, and freely allow the foreign export of unprocessed logs from state-owned lands. *Id.* Thus, a foreign country wishing to import unprocessed logs from state-owned lands is faced with a bewildering variety of state-imposed rules. As in *Japan Line*, "this . . . obviously . . . make[s] 'speaking with one voice' impossible." 441 U.S. at 453.

In this case, the Ninth Circuit completely ignored the foreign commerce aspect of Alaska's primary manufacture

poses of GATT as federal actions. As tariffs decline local actions can become a major nontariff barrier to trade and it is necessary that nations agree together to prevent these, just as they agree on other barriers.

Jackson, *World Trade and the Law of GATT* (1969), at 116 (footnote omitted). See also *id.*, at 111 ("The conclusion of the American courts has been that GATT does apply to state (or territorial) law.").

²⁰ As this Court noted in *Japan Line*,

[i]f other States follow California's example (Oregon has already done so), foreign-owned containers will be subject to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously would make "speaking with one voice" impossible.

441 U.S. at 453 (footnote omitted).

²¹ These statutes are set out in Pet. App. at 36a-38a.

requirement, and the foregoing precepts established by this Court. In so doing, it reached an unwarranted decision about the permissibility of Alaska's ban on the foreign export of unprocessed logs under the Commerce Clause. It allowed Alaska to take over the sensitive Congressional function of balancing national and international interests, and to impose a selfish burden on foreign commerce with one of this Nation's major trading partners. This is impermissible. Congress knows how to regulate exports to foreign countries and its regulation is, and should be, exclusive.

II. Congressional Consent To Alaska's Primary Manufacture Requirement Has Not Been Given Expressly; Alaska's Action Is, Therefore, Subject To Traditional Commerce Clause Restraints.

A. Congressional Consent To State Action That Would Otherwise Violate The Commerce Clause Must Be Stated Expressly.

"Congress has undoubted power to redefine the distribution of power over interstate commerce . . ." by consenting to state action that would otherwise violate the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). However, this Court has emphasized that it has only

found such consent, [when] Congress' " 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *New England Power Co. v. Hampshire* . . . (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 . . . (1946)).

Sporhase v. Nebraska ex rel. Douglas, 102 S. Ct. 3456, 3466 (1982)(footnote omitted); see *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

In several cases in which this Court has found express consent, the federal statute involved had been enacted specifically to reallocate the tentative distribution of power made by this

Court. *See, e.g., In re Rahrer*, 140 U.S. 545 (1891);²² *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).²³ Under these circumstances, Congress had expressly made the policy judgment that state laws—"which in its silence might be held invalid as discriminatory," 328 U.S. at 431—were not contrary to the national public interest.

In subsequent years, this Court has continued to require *express* Congressional consent. For example, in *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), this Court found that, although Congress had given the states wide latitude to regulate the milk industry, there was "no federal approval or

²² In *Rahrer*, this Court upheld the Wilson Act, 27 U.S.C. § 121 (1976), which had been enacted in response to this Court's decision in *Leisy v. Hardin*, 135 U.S. 100 (1890).

²³ In 1944, this Court held that the business of insurance was "commerce" subject to the Sherman Act. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Congress responded by enacting the McCarran-Ferguson Act of 1945, which stated in part: "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (1982). A year later in *Prudential Insurance Co. v. Benjamin*, the Court rejected a Commerce Clause challenge to a South Carolina tax that allegedly discriminated against out-of-state insurance companies. The Court held that the McCarran-Ferguson Act had given express approval to the state activity challenged. Congress had "expressly stated its intent and policy," 328 U.S. at 427, to allow the states to regulate and tax the business of insurance free from dormant Commerce Clause constraints. Although it assumed that the tax was discriminatory, 328 U.S. at 429, this Court rejected the Commerce Clause challenge. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. § 1011, to authorize state taxing and regulatory powers over the insurance business).

responsibility for the challenged features of [the] order [in question]. . . ." 336 U.S. at 542.²⁴ Justice Jackson explained:

We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. And the provisions looking to state cooperation may be sufficient to warrant the state in imposing regulations approved by the federal authorities, even if they otherwise might run counter to the decisions that coincidence is as fatal as conflict when Congress acts. . . . *It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.*

H. P. Hood & Sons, 336 U.S. at 542-43 (citation omitted; emphasis added).

This Court has reaffirmed the requirement that consent be stated expressly in three recent cases. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), rejected the contention that the Federal Power Act authorized New Hampshire to prohibit the exportation of hydroelectric power produced within its borders or otherwise reserve for its own citizens the economic benefit of such hydroelectric power. This Court found no "affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.' " 455 U.S. at 341 (quoting *Southern*

²⁴ The Court's emphasis on federal approval served to distinguish *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the United States Secretary of Agriculture had affirmatively cooperated in promoting the state program and aided it through substantial federal loans. The Court in *Hood* made it clear that such affirmative expressions of federal approval are essential if state actions otherwise inconsistent with the Commerce Clause are to withstand scrutiny. *H. P. Hood & Sons*, 336 U.S. at 537.

Pacific Co. v. Arizona, 325 U.S. at 769). "Nothing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause,' *United States Public Utilities Comm'n of California*, *supra*, at 304, or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade." 455 U.S. at 341. This Court concluded: "when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " 455 U.S. at 343 (citations omitted).²⁸

Similarly, *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456 (1982), rejected a contention that Congress had authorized Nebraska to prohibit the exportation of groundwater unless the importing state granted reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska. This Court found that this "reciprocity requirement [did] not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." 102 S. Ct. at 3465 (footnote omitted)(quoting *Hughes v. Oklahoma*, 441 U.S. at 337). This Court recognized that thirty-seven federal statutes and several interstate compacts "demonstrate[d] Congress' deference to state water law," 102 S. Ct. at 3466 (footnote omitted), but found that there was no indication "that Congress wished to remove federal constitutional constraints on such state laws. . . . In the instances in which we have found . . . consent [to state restraints on commerce], Congress' "intent and poli-

²⁸ In contrast to this Court's approach in *New England Power*, the court below clearly engaged in "mere speculation as to what Congress probably had in mind." See discussion, *infra*, at 27-32. The "implicit approval" approach devised by the court below would introduce an unnecessarily complex and indeterminate inquiry into Commerce Clause litigation, and would encourage more attempts at local protectionism.

cy" to sustain state legislation from attack under the Commerce Clause' was ' "expressly stated." ' " 102 S. Ct. at 3466.

This well-established analysis was followed just last Term in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983). In *White*, this Court rejected a Commerce Clause challenge to an executive order (issued by the Mayor of Boston) "which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston." *Id.* at 1043 (footnote omitted). In so doing, this Court reiterated the well-settled principle that "[w]here state or local government action is *specifically authorized* by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *Id.* at 1047 (emphasis added). The Court found appropriate federal authorization there because "the order was *affirmatively sanctioned* by the pertinent [federal] regulations. . . ." *Id.* at 1048 (emphasis added).²⁸

The requirement that Congressional consent be "expressly stated" is central to this Court's Commerce Clause jurisprudence. The allocation of power to regulate commerce between Congress and the states is a serious political matter. Questions of the distribution of power between the federal government and the states, the maintenance of interstate comity, and the protection of free trade and interstate equality in access to natural resources are all centrally involved.

The requirement that Congress expressly state its consent to a state restraint is particularly important in cases—like this one—where the principal burden of the state's action falls on those located outside the state. Such discriminatory acts run afoul of the fundamental Commerce Clause concern that "a legislature representative of the people whose significant in-

²⁸ The federal regulations, set forth at 103 S. Ct. at 1047-48 n.11, "affirmatively permit[ted] the type of parochial favoritism expressed in the order." 103 S. Ct. at 1047 (footnote omitted).

terests are affected . . . [have] made the decision [in question]." O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 Or. L. Rev. 395, 400 (1982). It is permissible for Congress to consent to such discriminatory legislation because those adversely affected are represented in the political body deciding that the discriminatory legislation is in the national interest.²⁷ But it is only when Congressional consent is explicit that we can have any confidence that those adversely affected have had an opportunity to participate in the governmental decision that has done them harm.²⁸ Indeed, this concern is even more important where the discrimination is against foreign countries or nationals since their only political recourse is through the diplomatic process, and foreign diplomats are accredited only to the federal government. *See generally* discussion, *supra*, at 14-22.

B. Congress Has Not Authorized Alaska's Restraint On Interstate And Foreign Commerce.

As both courts below recognized, Congress has not expressly authorized Alaska's primary manufacture requirement or its resulting ban on the export of unprocessed logs (511 F. Supp. at 141; J.A. at 131a; 693 F.2d at 893; J.A. at 142a), and respondents apparently do not contend otherwise. *See* Supp. Resp. Br. at 2.²⁹ Instead, the court below held that Congress had

²⁷ *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1964); Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387, 401 (1983).

²⁸ *See* J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* 268 (2d ed. 1983) ("[T]he dangers of a part discriminating against the whole are greater than the whole discriminating against a part, for an inner political check that is not operative in the former is operative in the latter case").

²⁹ In fact, respondents admit that Congress has been silent on this issue. Supp. Resp. Br. at 5 n.2. Respondents' position is that this

given "implicit approval" to the state's export ban since (said the court) it paralleled federal policy with respect to timber harvested from *federal* lands. As this Court's decisions make plain, this is not an acceptable analytical approach.

Alaska justifies its primary manufacture requirement on the basis of a federal regulation (36 C.F.R. § 223.10(c) (1982)), which governs the export of unprocessed logs from *federal* lands in Alaska. This regulation, in turn, is based on The Organic Administration Act of 1897 (16 U.S.C. §§ 475, 551), which, *inter alia*, authorized the Secretary of Agriculture to sell timber from national forests for use ". . . in the State or territory [of origin], but not for export therefrom." Act of June 4, 1897, 16 U.S.C. § 476, *repealed by* National Forest Management Act of 1976, § 13, 90 Stat. 2958. However, every appropriations act from 1917 to 1926 authorized the Secretary to permit exports from national forests under certain circumstances, (*see, e.g.*, Act of May 11, 1926, 44 Stat. 512), and in 1926 an Act was passed which provided permanent authority to export unprocessed logs from national forests and the Territory of Alaska if "the supply of timber for local use will not be endangered thereby." Act of April 12, 1926, 16 U.S.C. § 616 (1982). Nevertheless, in 1928 the Secretary by regulation prohibited the export of logs from Forest Service lands in Alaska without the Regional Forester's permission, and it is the successor to that regulation (36 C.F.R. § 223.10(c)) that Alaska now relies on to justify its own primary manufacture requirement for logs harvested from its lands.³⁰

Congressional silence should be read as approval of the state's policy. *Id.* This position is flatly inconsistent with this Court's decisions, which have always required that the federal government affirmatively authorize the state restraint in question. *See discussion, supra*, at 22-27.

³⁰ The limitation on log exports from Alaska was established by the then Secretary of Agriculture in instructions which were issued pursuant to Regulation S-2 which provided that "[u]nless prohibited by specific instructions from the Secretary of Agriculture, timber

The next major Congressional initiative occurred in 1968 when Congress enacted Part IV of the Foreign Assistance Act of 1968, known as the Morse Amendment, Pub. L. No. 90-554, § 401, 82 Stat. 966, which instituted a log export quota covering timber from all federal lands west of the 100th meridian, including Alaska. When the Amendment expired on December 31, 1971, it was extended on a temporary basis until 1973 by an amendment to the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 921, 84 Stat. 1817. Then in October, 1973, Congress, in a rider to the Department of Interior Appropriations Act (Pub. L. No. 93-120, § 301, 87 Stat. 511 (1973)), instituted a ban on the export of unprocessed timber from federal lands west of the 100th meridian in the contiguous 48 states (*i.e.*, federal lands in Alaska were no longer included within the ban). This ban has been reinstated in each succeeding year in the Department of Interior Appropriations Acts. *See, e.g.*, Pub. L. No. 96-126, § 301, 93 Stat. 979 (1979) (in effect when this action was filed).³¹

lawfully cut on any National Forest may be exported from the State or Territory where grown." In 1946, Regulation S-3 (the successor to Regulation S-2) was amended to incorporate the instructions. The current regulation reads substantially as it did when set forth as instructions to Regulation S-2. *1968 Hearings Pt. 3*, at 1092. *See generally 1968 Hearings Pt. 1*, at 92-94. *See also* 36 C.F.R. § 223.10(i) (1977).

³¹ That rider provided that:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser: Provided that this limitation shall not apply to specific quantities of grades and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.

In short, Congress has imposed a general export ban only on unprocessed logs from *federal* lands.³² This is not an oversight, but rather a conscious policy decision. Congress has on a number of occasions declined to enact legislation that would have extended export restrictions to include logs from lands other than federally-owned lands. *See, e.g.*, S. 1734, 92d Cong., 1st Sess. (1971); S. 1033, 93d Cong., 1st Sess. (1973); S. 1820, 93d Cong., 1st Sess. (1973); S. 1507, 93d Cong., 1st Sess. (1973); H.R. 8547, 93d Cong., 1st Sess. (1973); H.R. 639, 97th Cong., 1st Sess. (1981); *see* H.R. Rep. No. 93-325, 93d Cong., 1st Sess. (1973); S. Rep. No. 93-198, 93d Cong., 1st Sess. (1973).³³ Indeed, in 1981, Congress was specifically asked to grant "the States authority to pass laws regarding domestic manufacturing. . . ." 1981 *Hearings*, at 18-19.³⁴ Again, it declined to do so. Indeed, the only time Congress has approved export restrictions involving logs from state-owned as well as federally-owned lands was in 1979 when it enacted legislation designed to curb exports of unprocessed western red cedar—and Alaska

³² Even there, Congress has repeatedly declined to close loopholes in existing legislation, or to make that legislation permanent. *See, e.g.*, S. 1775, 93d Cong., 1st Sess. (1973); H.R. 5544 and 6820, 94th Cong., 1st Sess. (1975); H.R. 7972, 95th Cong., 1st Sess. (1977); H.R. 7255, 96th Cong., 2d Sess. (1980); H.R. 639, 97th Cong., 1st Sess. (1981). *See also* 1978 *Hearings*, at 90; 1975 *Hearings*, at 1-8, 11.

³³ *See generally* *Export Control Policy: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. 257-58 (1973); *Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 285, 303, 330 (1973); 1978 *Hearings*, at 106; 1981 *Hearings*, at 23, 87, 106-07. *See also* Native Claims Settlement Act, 43 U.S.C. § 1621(k)(1) (1976), which contained a temporary restriction on log exports. This restriction expired in 1976, and has not been reenacted. Thus, unprocessed logs from Native American lands in Alaska are freely exportable.

³⁴ This request was prompted by the district court decision below. 1981 *Hearings*, at 18-19.

is exempt from even that limited restriction. See Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i); Pub. L. No. 96-126, § 308, 93 Stat. 980 (1979); 15 C.F.R. § 377.7 (1983). See generally *Extension and Revision of the Export Administration Act of 1969: Hearings and Mark-Up Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. Pt. 1, 453-461, 705-11 (1979). Thus, the court below could have as readily concluded that Congress had decided *not* to restrict the export of logs from timber on state-owned lands as it did that such a restriction had received Congress' "implicit approval."³⁵

Nor is it at all clear that the federal policy is even consistent with the Alaska regulation. As the Solicitor General noted,

The objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 . . . is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose of the Alaskan statute, however, is to protect in-state manufacturers as well as to secure a continuous supply. . . . It may well be that the federal lands restriction fully satisfies the congressional concern to assure a continuous supply of timber for the United States, while the state statute continues to operate in pursuit of a protectionist aim that Congress did not endorse.

U.S. Br. at 8. Moreover, the federal regulation upon which Alaska relies simply states that the "requirement is necessary to ensure the development and continued existence of ade-

³⁵ Indeed, this conclusion is essentially the same as that reached in a recent staff report published by a Committee of the Oregon legislature that examined the Oregon primary manufacture statute. See Oregon Joint Legislative Committee on Trade and Economic Development, *Final Draft, The Log Export Issue: An Analysis*, at 23 (1983); Pet. App. at 62a-83a. See also U.S. Br. at 7-8 ("Thus, it can be inferred that Congress favors the unrestricted export of all timbers except red cedars from state lands and *disapproves* any restrictions on timber export from the State of Alaska").

quate wood processing capacity in that State for the sustained utilization of timber *from the National Forests which are geographically isolated from other processing facilities.*" 36 C.F.R. § 223.10(c)(emphasis added). There is in this expression of federal policy with respect to federally-owned lands no indication that the federal government has taken any position on the "promot[ion] of industrial developments in isolated areas" generally (693 F.2d at 893; J.A. at 143a), or that the federal government has taken any position with respect to the processing of timber from *state-owned* lands.

In sum, neither Congress nor the federal government generally has authorized Alaska's primary manufacture requirement.³⁶

III. The Market Participant Doctrine Does Not Immunize Alaska From The Requirements Of The Commerce Clause.

In the proceedings below, respondents relied most heavily on the market participant doctrine to justify Alaska's local processing requirement. Although the market participant issue was not decided by the Ninth Circuit (*see* discussion, *supra*, at 8), respondents have explicitly raised the issue for review by this Court, *see* Resp. Br. at i., 10-14, and this Court's grant of certiorari did not exclude it from consideration.³⁷

³⁶ The court of appeals failed to make any search for a clear expression of federal intent to redefine federal/state power to regulate commerce in this case. It failed to make any search for an indication that the federal government has made the affirmative political choice that Alaska's protectionism "advance[s] the national welfare." *H. P. Hood & Sons*, 336 U.S. at 543. The court's failures are all the more important in the context of foreign commerce. In the absence of a statement to the contrary, the express Congressional policy with respect to exports (*see* discussion, *supra*, at 18-20) should control.

³⁷ Furthermore, although it does not explicitly refer to the market participant doctrine by name, the first question presented in the petition clearly encompasses the market participant issue.

Consequently, we urge the Court to address this issue now.

The market participant doctrine was first enunciated and applied by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)—a case which bears little factual similarity to the present case. That case concerned a Maryland statute designed to remove abandoned automobiles from the state by providing a bounty to licensed scrap dealers who received such “hulks” from the owners of the cars or licensed wreckers. An amendment to the state statute enacted in 1974 imposed more exacting documentation requirements on out-of-state processors than on in-state processors, which placed out-of-state processors at a disadvantage in obtaining “hulks” and, hence, state bounties. In response to an out-of-state processor’s Commerce Clause challenge to the Maryland statute, this Court concluded that it did not involve “the kind of action with which the Commerce Clause is concerned,” explaining that “Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead it has entered into the market itself to bid up their price.” 426 U.S. at 805, 806. The Court therefore declined to hold that “the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.” *Id.* at 808. Instead, it concluded that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” 426 U.S. at 810 (footnote omitted).

Significantly, the Court in *Alexandria Scrap* suggested that it might not have reached the same result if the market affected by the bounty scheme had not been “created” by the state. 426

U.S. at 809 n.18.³⁸ As Justice Stevens also emphasized in his concurring opinion,

It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap-processing business.

By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist.

426 U.S. at 815.

Four years later, this Court again upheld a state residence preference program on the ground that the state had simply acted as a market participant. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). *Reeves* involved a state-owned and operated cement plant. Because of a cement shortage, the State Cement Commission had decided to confine the sale of cement from the plant to state residents. In response to a Commerce Clause challenge by an out-of-state cement distributor, this Court held that the Commission's action did not violate the Commerce Clause since the state was acting as a market participant

³⁸ As explained by the Court,

[w]e note that the commerce affected by the 1974 amendment appears to have been created, in whole or in substantial part, by the Maryland bounty scheme. We would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented.

426 U.S. at 809 n.18.

rather than as a market regulator. In so doing, the Court emphasized that "[r]estraint in this area is counseled by considerations of state sovereignty, the role of each State as 'guardian and trustee for its people' . . . and the 'long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'" 447 U.S. at 439 (citations omitted; footnotes omitted). Significantly, however, the Court indicated that it was not addressing "the limits imposed on state proprietary actions by the 'foreign commerce' Clause," noting only "that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." 447 U.S. at 438 n.9.

Moreover, *Reeves* clearly distinguished a manufactured good like cement from natural resources "like coal, timber, wild game, or minerals," explaining that

[cement] is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.

447 U.S. at 444 (citations omitted; footnote omitted). In so doing, this Court emphasized that the State of South Dakota had borne substantial risk in establishing the cement plant, 447 U.S. at 446 n.19, and that invalidation of the state preference program would "rob South Dakota of the intended benefit of its foresight, risk and industry." 447 U.S. at 446.

The third and most recent of this Court's decisions addressing the "market participant" doctrine is *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), discussed, *supra*, at 26. There this Court, in response

to the dissent's argument that "regulation" rather than "market participation" was involved,³⁹ acknowledged that there were still some yet undefined limits to the market participant doctrine, but concluded that

[w]herever the limits of the market participation exception may lie, we conclude that the executive order in [that] case falls well within the scope of *Alexandria Scrap* and *Reeves*.

103 S. Ct. at 1046-47 n.7.

As the Court recognized in *White*, the precise limits to the market participant doctrine have yet to be defined. *Id.* See also Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 88 (1980). Whatever those limits are, however, here, unlike the case in *White*, Alaska's preference program falls well outside the scope of *Alexandria Scrap* and *Reeves*. This is for several reasons.

First, as the district court below noted, the market participant exemption here is being invoked to hoard state-owned *natural resources* found "by happenstance" within the state, not a "manufactured good" produced at a "costly physical

³⁹ The dissent in *White* (written by Justice Blackmun) emphasized that where the state imposes residence preference requirements as conditions to its contracts with private parties, it is acting more as a market regulator than as a market participant, and hence, is not entitled to the market participant exemption:

The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom he may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.

103 S. Ct. at 1050.

plant" built with state taxpayer money, and at substantial risk to the state as was the case in *Reeves*. See also *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982) (characterizing the *Reeves* market participant exemption as one that allows states to confine to its residents the sale of goods it produces).⁴⁰ As this Court established in *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), state ownership of a natural resource does not necessarily in and of itself provide a constitutionally sound basis for a state to favor its own residents in the disposition or use of that resource. See also *Hughes v. Oklahoma*, 441 U.S. 322 (1979). This situation is quite different from that where a state favors its own residents in the distribution of manufactured goods created at a manufacturing facility built with the residents' tax dollars (as was the case in *Reeves*), or where the state itself has "created" a market through a subsidy funded by state tax dollars (as was the case in *Alexandria Scrap*). Here, Alaska is restraining the foreign and interstate export of a natural resource which is "by happenstance" located in the state. That should not be permissible under the market participant doctrine. See Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 Geo. Wash. L. Rev. 601, 625 (1982).⁴¹

Second, the Alaska requirement, unlike that in *White*, exceeds the "limits on a state or local government's ability to

⁴⁰ Similarly, in *Sporhase*, this Court characterized *Reeves* as involving "a good publicly produced and owned in which a State may favor its own citizens in times of shortage." 102 S. Ct. at 3464-65.

⁴¹ This is especially true in the case of Alaska, whose natural resources were originally purchased by the United States from Russia and then given *gratis* to the state. See *Hicklin v. Orbeck*, 437 U.S. 518, 528 n.11 (1978). As one commentator has noted, "[i]n any case where the state's wealth does not derive from the contributions of residents acting through the state, there is good reason to adhere strictly to obligations of interstate equality" and "[t]hat is especially true when the national government conveys property to a state without compensation." Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 557 n.238 (1981).

impose restrictions that reach beyond the immediate parties with which the government transacts business." *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. at 1046 n.7. Unlike the situation in *White*, the Alaska primary manufacture requirement does not involve "a discrete, identifiable class of economic activity in which the city is a major participant" in the sense that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* Here, the situation is more akin to that in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), which, unlike *White*, involved natural resources.

In *Hicklin*, this Court struck down under the Privileges and Immunities Clause an Alaska statute that required that all oil and gas leases, easements and right-of-way permits for oil and gas pipelines to which the state was a party require that qualified residents be hired in preference to non-residents. Relying extensively on the "mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause," and Commerce Clause precedents which "establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce," *id.* at 531, 533, this Court concluded that the Alaska statute imposed downstream conditions which far exceeded Alaska's legitimate proprietary interest in its oil and gas resources. In so doing, it explained that "the breadth of the discrimination mandated by [the statute] goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support." 437 U.S. at 534. Alaska's ownership of the natural resources was not sufficient to justify the discrimination in *Hicklin*, because Alaska had "little or no proprietary interest in much of the activity swept within the ambit of" the statute and "the connection of the State's oil and gas with much of the covered activity [was] sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents." 437 U.S. at 529.

Hicklin bears marked similarity to the present case. In *Hicklin*, Alaska in effect told those to whom it provided commercial access to its oil and gas reserves that they would have to hire Alaska residents if they wanted to be eligible to exploit those reserves; in this case, Alaska is doing essentially the same thing by telling potential purchasers of its timber they can deal only with Alaska processors. See Contract (J.A. at 88a) ("[t]imber cut under this contract shall not be transported for primary manufacture outside the State of Alaska . . ."). This Alaska cannot do, since "the power the States may have to discriminate in favor of their in-state residents and businesses in the distribution of state-owned natural resources does not permit the States to attach conditions to the use or disposition of the resources that might independently burden interstate commerce or some other constitutionally protected interest." Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980). See also Anson & Schenckan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 77 (1980) [hereinafter "Anson & Schenckan"]. In other words,

[t]he apparent concern [in *Hicklin*] was that Alaska had attempted to pyramid its ownership of oil and gas into control of the private sector on such a wide basis that the program of conditional distribution was barely distinguishable from regulation. But resemblance to regulation would be equally apparent if Alaska had only required direct contractors to favor resident interests, for the virtually coercive power that accompanies control of such scarce and valuable resources would be fully as effective as regulation in causing immediate contractors to bias their business decisions. It was really the conditions placed on eligibility to exploit the state resources, together with the state's bargaining power, that raised the problem—not the breadth of the program.

Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 562 (1981) [hereinafter "Varat"]. Such "conditions placed on eligibility to exploit the state[s] resources" are

precisely what are at issue here, and they should be invalidated here, as they were in *Hicklin*.

Thus, Alaska's conditional sale of its natural resources is, quite simply, an act of regulation. Although the line between "market participant" and "market regulator" is not always easy to draw,⁴ Alaska's effort to protect its wood processing industry clearly falls in the latter category. Alaska is not a participant in the logging or milling business. Alaska is not, therefore, a participant in the market it seeks to affect. The primary manufacture requirement is an effort to leverage the influence of the state's prior ownership of the timber to a downstream market. The regulatory nature of the state's conduct could not be clearer.

Third, unlike *Alexandria Scrap*, *Reeves*, and *White*, the primary economic impact of the Alaska scheme is on out-of-state consumers rather than in-state taxpayers. Each of the earlier cases involved primarily an intra-state program financed by local tax dollars, with only incidental out-of-state effects. By contrast, the timber industry in Alaska is overwhelmingly an export industry. This means that the costs of the state-imposed restraint would be on consumers outside Alaska. By contrast, a significant part of the cost of the preference scheme at issue in *White* would fall on Massachusetts taxpayers and citizens; and this is equally so for the taxpayers in Maryland for the scheme in *Alexandria Scrap* and the South Dakota taxpayers for the scheme at issue in *Reeves*.

Fourth, unlike *Alexandria Scrap*, *Reeves*, and *White*, this case primarily involves foreign commerce, and as this Court suggested in *Reeves*, this fact alone may call into serious doubt the propriety of applying the market participant doctrine. Indeed, to the extent that the market participant doctrine rests upon fundamental notions of state sovereignty, *Reeves, Inc. v. Stake*, 447 U.S. at 438, it is questionable whether the

⁴ See, e.g., *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981).

exemption, whatever its purposes and limits in the interstate commerce context, should be applied at all where barriers to foreign commerce are imposed. As this Court noted in *Japan Line*:

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited.

441 U.S. at 449 n.13. In short, even if the market participant doctrine could conceivably be found to immunize Alaska's protectionist preference scheme with regard to interstate commerce (which under this Court's decisions and for the reasons stated herein it should not), it certainly does not follow that it should also immunize such a scheme if its primary burden falls on foreign commerce, as is the case here.

Finally, Alaska has done what South Dakota in *Reeves* did not: it has imposed an absolute ban on the export of a product (i.e., unprocessed logs no longer owned by the state),⁴³ on the sole ground that it was harvested from state-owned lands. Whatever the appropriate limits to the market participant doctrine are with regard to state subsidies, surely an absolute state-imposed prohibition such as that at issue here far exceeds the legitimate reach of that doctrine. See *Hughes v. Alexandria Scrap*, 426 U.S. 794, 806 (1976) (where this Court noted that Maryland "ha[d] not sought to prohibit the flow of hulks").⁴⁴

⁴³ Under the proposed contract, ownership would pass when the timber was "paid for, cut and scaled." (J.A. at 64a). Thus, Alaska here is attempting to regulate the disposition of a product it no longer owns.

⁴⁴ Here, the district court found "that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing." (511

In sum, therefore, the market participant doctrine should not be applied here where (1) the article of commerce at issue is not a manufactured good produced at a "costly" plant established by the state, and is readily producible by other states as well, but rather a natural resource which "by happenstance" is located within Alaska; (2) the state has not created a market by a state-financed subsidy program; (3) the state policy restrains not only the immediate party in its relationship with the state but attaches "downstream" conditions as well; (4) the primary economic impact of the state scheme is on out-of-state consumers rather than in-state taxpayers; (5) the state restriction impacts most directly on foreign commerce rather than interstate commerce; and (6) the state restraint involves not a subsidy, but a total ban on the export of a natural resource beyond the state's borders.

If the market participant doctrine is applied to these extreme facts, then the concern of the dissenters in *Alexandria Scrap* and *Reeves* about the absence of any "limiting principles" will become a reality (see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 829; *Reeves, Inc. v. Stake*, 447 U.S. at 453); and it will not be difficult to "foresee future state actions 'set[ting] barrier[s] to traffic between one state and another as effective as if customs duties . . . had been laid upon the thing transported.'" *Hughes v. Alexandria Scrap Corp.*, 426 U.S.

F. Supp. at 144; J.A. at 135a). This finding echoes Justice Stevens' observation in *Alexandria Scrap* that the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry." 426 U.S. at 816 (Stevens, J., concurring). This Court has made it clear, however, that absolute bans on interstate commerce are particularly suspect. As it noted in *Reeves*, "South Dakota [had not] cut off access to its cement altogether, for the [state's] policy [did] not bar resale of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17.

at 829 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)). As was noted by the dissent in *Reeves*,

Since the Court's decision contains no limiting principles, a State will be able to manufacture any commercial product and withhold it from citizens of other States. This prerogative could extend, for example, to pharmaceutical goods, food products, or even synthetic or processed energy sources.

447 U.S. at 453 n. 6. If the market participant doctrine is applied to this case as Alaska has urged, this "prerogative" will also extend to all states which will indeed be able to "withhold," not only their manufactured goods, but also their natural bounties "from [the] citizens of other states." This should not be condoned.⁴⁵

⁴⁵ In part, the market participant doctrine has been criticized on the ground that a "State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy. . . ." Anson & Schenkkan, at 89 n.90 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 849 (1976)). "Even when it acts as a proprietor, a state cannot be equated with private entrepreneurs" for "[a]s Justice Powell noted in dissent in *Reeves*, the State responds to incentives and maximizes values that no private economic actor would respond to or value." Anson & Schenkkan, at 89. In addition, parochial state legislation—whether construed as market participation or regulation—is likely to implicate interstate comity concerns not present when a private entity acts. Thus, even those commentators who have approved the results in this Court's market participant cases have sought to develop principled limitations to the doctrine which seek to preserve the states' interests in fiscal autonomy while recognizing that parochial state actions—in whatever form—threaten fundamental Commerce Clause concerns. See generally Anson & Schenkkan, *supra*; Varat, *supra*; Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073, 1130-35 (1980).

CONCLUSION

The judgment below should be reversed and the case remanded for reinstatement of the district court's judgment.

Of Counsel

DONALD I. BAKER
KAREN L. GRIMM
SUTHERLAND, ASBILL &
BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-7800

ERWIN N. GRISWOLD
RICHARD S. MYERS
JONES, DAY, REAVIS &
POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

November, 1983

Respectfully submitted,

LEROY E. DEVEAUX
(Counsel Of Record)
RICHARD L. CRABTREE
MICHAEL G. KARNAVAS
WANAMAKER, DEVEAUX &
CRABTREE, APC
1031 West Fourth Avenue
Suite 401
Anchorage, Alaska 99501
(907) 279-6591
Counsel for Petitioner